



TILTED SCALES:

Social Conflict and Criminal Justice in Guatemala



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I. Executive Summary

Guatemala has made progress in the last decade addressing the legacy of thirty-six years of internal armed conflict, including by holding key actors responsible for atrocities.² However, the level of social conflict in Guatemala remains high in part because many of the issues that contributed to past discord remain unresolved. These issues include disputes over land titles and the exploitation of resources in historically indigenous territories. Social conflict has at times manifested in violence against both indigenous communities and individuals associated with business interests. In this setting, a wide variety of organizations – local and international, governmental and non-governmental – have reported a pattern of attacks, threats, and frivolous criminal charges against human rights defenders,³ specifically in the context of disputes over megaprojects⁴ in indigenous lands.⁵ These reports prompted the American Bar Association's Center for Human Rights, Georgetown University Law Center's Human Rights Institute and the Robert F. Kennedy Center for Justice and Human Rights to conduct a fact-finding mission in Guatemala to determine whether allegations of the misuse of the judicial system against human rights advocates were well founded. We interviewed government officials, civil society leaders, defense attorneys and community activists in Guatemala City from November 26-30, 2012.⁶ In addition, we reviewed court documents, official reports and press accounts concerning emblematic cases to evaluate the sufficiency of the evidence against defendants, the government's response to credible threats against activists and the conduct of business personnel.

During the course of our visit, our team learned that despite the efforts of many justice sector personnel, the Guatemalan judicial system often does not effectively address, and in some instances exacerbates, social conflict. Attorney General Claudia Paz y Paz Bailey, who has led the Public Ministry (Prosecutor's Office) since 2010, has been globally recognized for her strong stance against impunity and her willingness to prosecute prominent individuals for alleged crimes committed during the internal armed conflict. She has also sought to promote the rule of law by, *inter alia*, attempting to ensure that the use of force against protesters is not excessive. Despite the commendable efforts of Dr. Paz y Paz, some Public Ministry employees, namely local and rural prosecutors, are reported to pursue charges against human rights defenders ("defenders") based on insufficient or incomplete information.

There is a generalized suspicion among non-governmental organizations that false charges are often brought against defenders by their opponents, such as companies managing megaprojects, their representatives, or powerful landowners, and that these charges are not always properly disposed of by the courts. Efforts to deal with serious crimes, including the murder of individuals perceived as opposing megaprojects, have not usually resulted in conclusive investigations. Among the Guatemalan human rights community, there is a widely-held belief that leaders have been convicted for misconduct committed by fringe elements of the protest movements without proof beyond a reasonable doubt. In two cases cited by local advocates, community leaders were convicted solely on the basis of witness testimony offered by

² See, e.g., HUMAN RIGHTS WATCH, *WORLD REPORT 2013: GUATEMALA* (2013), available at <http://www.hrw.org/world-report/2013/country-chapters/guatemala>.

³ A human rights defender is defined as "every person who in any way promotes or seeks the realization of human rights and fundamental freedoms, nationally or internationally." Inter-Am. Comm'n. H.R., *Second Report on the Situation of Human Rights Defenders in the Americas*, ¶12, OEA/Ser.L/V/II Doc. 66 (Dec. 31, 2011). This definition includes but is not limited to community activists, members of civil society, attorneys and judicial officials. "The criterion used to identify whether a person should be considered a human rights defender is the activity undertaken by the person and not other qualities, such as whether or not they are paid for their work or whether or not they belong to a civil society organization." *Id.* citing the Off. of the U.N. High Comm'r for Hum. Rts.

⁴ We use the term megaprojects to characterize a wide-range of activities, including the construction of hydroelectric dams, mining and other industrial projects.

⁵ UNIT FOR THE PROTECTION OF DEFENDERS OF HUMAN RIGHTS OF GUATEMALA (UDEFEUGUA), *Semesterly Report 3* (June 2011); Int'l Federation for Human Rights (FIDH), *Country Facts: Guatemala, Situation of Human Rights Defenders*, May 2011, available at http://www.fidh.org/Guatemala/654?id_mot=813 [hereinafter FIDH Country Facts]; PROCURADURÍA DE DERECHOS HUMANOS (GUATEMALAN HUMAN RIGHTS OMBUDSMAN'S OFFICE), *Informe Anual Circunstanciado – Resumen Ejecutivo* 2011 328 (Jan. 2012).

⁶ When expressly permitted and where applicable, we have indicated the names of interviewees and/or their organizational affiliation. Some interviews were conducted on a not-for-attribution basis.

police officers or relatives of the victims without supporting physical evidence.⁷ In addition to serious concerns about a pattern of criminalization,⁸ we learned that Guatemalan justice may also be compromised by an excessive use of pretrial detention; the failure to protect defenders; and delayed investigations of crimes

committed against them; targeted campaigns against judicial officers; and a failure on the part of international businesses to engage in constructive consultations with the local communities which are affected by their operations. The case synopses which are included in this report illustrate these patterns and themes.

II. Recommendations

a. To the Government of Guatemala:

- i. Respect and protect the rights of human rights defenders to peacefully protest and to be free from violence. Ensure that the military is not involved in activities to control demonstrations.
- ii. Ensure that threats and attacks against community leaders, protesters and corporate employees are promptly, thoroughly and impartially investigated, prosecuted and punished in accordance with the law.
- iii. Ensure that the authorities and third parties do not utilize the justice system to harass individuals and groups who are engaged in legitimate and lawful activities. Confirm that charges against human rights defenders are formulated with sufficient precision to conform with the principle of legality and that legal proceedings do not violate the presumption of innocence. Refrain from charging and prosecuting community leaders and other individuals merely on the basis of association or for acts of conspiracy not supported by evidence of criminal intent.
- iv. Authorize pre-trial detention only when strictly necessary to guarantee that the accused will not hinder a criminal investigation or evade justice, provided that there is prompt judicial review of the detention and sufficient evidence associating the accused with the alleged crime. Alternatives to preventative detention should always be considered.
- v. Strengthen law enforcement capacity to properly handle and preserve forensic evidence. Prosecutors should control investigations by police as required by law and arrive promptly at crime scenes to ensure proper handling of evidence.
- vi. To the fullest extent under the law, ensure public access to information regarding the status of complaints filed concerning alleged prosecutorial misconduct. Ensure that the criteria for archiving cases are public and decisions regarding whether or not to pursue investigations are justified in writing and filed.
- vii. Ensure that disciplinary proceedings against judicial operators are independent and removed from political considerations, and that disciplinary decisions are subject to independent review.
- viii. Fully implement protective orders for human rights defenders. Establish comprehensive protective measures for high-profile judges to ensure their safety and independence.
- ix. Effectively regulate extractive industry operations. Promote and facilitate peaceful, constructive dialogue between community and business leaders. Ensure that culturally and linguistically appropriate consultations are held with affected communities prior to permitting the development of megaprojects, in accordance with international human rights standards.⁹ Require the free, prior and informed consent of affected

⁷ UDEFEGUA report on Aberlardo Curup (2007) (reporting that the court summarily accepted the testimony of the victim's family members, notwithstanding the fact that they were unable to see the attacker's face, and rejected the defense's witnesses on the basis of unsubstantiated claims regarding their credibility) (on file with authors); UDEFEGUA report on Ramiro Choc and trial court judgment (2009) (indicating that activist leader who was attempting to mediate during an eviction was convicted of robbery solely on the basis of police testimony) (on file with authors).

⁸ Criminalization encompasses the manipulation of the organs of justice by the state or third parties for the illegitimate purpose of harassing or punishing a person for engaging in human rights-oriented activity. This includes, *inter alia*, filing spurious charges, opening groundless criminal investigations, fair trial violations, and any other forms of pressure or arbitrary action. See *Second Report on the Situation of Human Rights Defenders in the Americas*, *supra* note 3, ¶¶ 76-77.

⁹ See, e.g., Int'l Labor Org. Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries, art. 6, June 27, 1989, ratified by Guatemala June 5, 1996, 28 I.L.M. 1382 [hereinafter ILO Convention No. 169].

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- indigenous communities where their way of life is threatened, as required by the Inter-American Court of Human Rights.¹⁰
- x. Ensure that private security contractors are properly vetted according to principles of human rights due diligence.
- b. To Community Leaders:**
- i. Encourage compliance with relevant legal standards concerning peaceful assembly.
 - ii. Promote dialogue that contributes to peaceful discussions and the settlement of disputes.
- c. To Business Leaders:**
- i. Ensure proper vetting and training of personnel according to principles of human rights due diligence.
- ii. Promote responsible dialogue and avoid the stigmatization of community members and human rights defenders.
 - iii. Report payments made to host country governments and justly compensate communities adversely impacted by business activity.
- d. To Lenders:**
- i. Multilateral banks that funded projects involving the forcible displacement of communities during the internal armed conflict should provide reparations to affected communities equivalent to the profits and interest earned and consistent with existing reparations agreements.

III. Background

a. Historical context

In Guatemala, ongoing social divisions are closely related to the country's decades-long internal armed conflict (1960-1996), which resulted in the deaths of over 200,000 people¹¹ and the violent dispossession of many people and communities from their ancestral lands.¹² In conjunction with pervasive legal uncertainty regarding land ownership and the absence of collective land titles, the development of megaprojects that utilize natural resources and directly impact rural areas has often led to discord.¹³ Other historical and political factors, such as the lack of implementation of the 1996 Peace Accords, appear to contribute to this state of affairs.¹⁴

The social conflict between indigenous activists and wealthy landowners or urban elite that existed during the internal armed conflict remains, with international corporations playing an ever more significant role. Indigenous communities claim that they continue to be repressed by more powerful actors.¹⁵ Many activists allege that former military personnel who committed crimes during the war continue to serve in government or as private guards for companies involved in megaprojects.¹⁶ Independent organizations and individuals associated with business interests have invoked labels used during the armed conflict, such as "communist" and "terrorist," in attempts to delegitimize community members that oppose their operations.¹⁷

¹⁰ See *Saramaka People v. Suriname*, Inter-Am. Ct. H. R. (ser. C) No. 172, ¶ 134 (Nov. 28, 2007) [hereinafter *Saramaka*].

¹¹ The U.N.-sponsored Historical Clarification Commission found that 83% of the documented victims of the internal armed conflict were indigenous persons. *Guatemala: Memory of Silence*, Guatemalan Commission for Historical Clarification (1999).

¹² James Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Add.: Observations on the situation of the rights of the indigenous people of Guatemala with relation to the extraction projects, and other types of projects, in their traditional territories*, ¶¶ 58-60, U.N. Doc. A/HRC/18/35/Add.3 (June 7, 2011) [hereinafter *Anaya report*]; FIDH Country Facts, *supra* note 5.

¹³ *Anaya report*, *supra* note 12, ¶¶ 62-63.

¹⁴ See, e.g., Interview with Instituto de Estudios Comparados en Ciencias Finales en Guatemala (ICCPG) staff in Guatemala City, Guatemala (Nov. 28, 2012); Anonymous interview in Guatemala City, Guatemala (Nov. 26, 2012).

¹⁵ See, e.g., Interview with community activists, in Guatemala City, Guatemala (Nov. 28, 2012 and Nov. 30, 2012).

¹⁶ UDEFEQUA, *SEMIESTER REPORT 3* (Oct. 2012).

¹⁷ See *Denuncia de la Fundación Contra el Terrorismo*, No. 5 Año 1 (June 2013), available at <http://www.scribd.com/doc/150686505/Suplemento-FCT-5-año-1> (wherein the Foundation Against Terrorism accuses human rights defender Yuri Melni of fomenting violence and conflict, and analogizing groups opposed to mining to the "terrorism structures of the Cold War"); Raul Minondo Ayau, *Antes Ejército de Guatemala*, *El Pericorico*, Oct. 26, 2012 (referring to leaders of particular indigenous NGOs as "terrorists") (on file with authors). See also Interview with anonymous judicial official in Guatemala City, Guatemala (Nov. 27, 2012).

VI. Conclusion

The situation of human rights defenders in Guatemala is precarious. Defenders, including community activists, attorneys, and judges face a variety of serious risks. Many believe that legitimate actions (such as peaceful protests) have been essentially criminalized by a pattern of spurious charges against defenders. The fear of criminal prosecution and incarceration may have a chilling effect on defenders' activities. Moreover, activists report that defenders often receive violent threats, and some have been physically attacked and killed without sufficient investigation on the part of the government. Defenders must also contend with widely published derogatory and inflammatory statements against them, which are often distributed via online networks and in mainstream newspapers. The social divisions in Guatemala run deep and are inextricably related to the history of internal armed conflict. In such an environment, greater protection of the rights and freedoms of human rights defenders must be a priority.

Progress can be seen in some parts of government, such as at the highest levels of the Public Ministry. However, further action is needed. Local prosecutors and police should respect and protect the rights of defenders to peacefully protest and to be free from violence. The government should ensure that consultations are held with affected communities prior to permitting the development of megaprojects. Moreover, businesses and other members of the private sector should engage in responsible, constructive dialogue with local communities and follow international standards of human rights due diligence. Only with the commitment of all actors in Guatemala can the country move beyond its history of conflict to a future where human rights are ensured.